United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

For The Second Court

Docket No. 75-1246

UNITED STATES OF AMERICA,

Appellee,

-v.-

FERGUS M. SLOAN, et al.,

Defendants-Appellants.

REPLY BRIEF FOR APPELLANT ANDERSON

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Preliminary Statement

THE GOVERNMENT'S MISSTATEMENT OF THE CASE -- THERE WAS NO EVIDENCE OF ANDERSON'S PARTICIPATION IN A CONSPIRACY TO MAKE FALSE RECORDS IN ORDER TO FOOL THE SEC BY SENDING IT A FALSE FORM X-17A-5.

Simply put, in stating the alleged case against Anderson, nowhere does the Government's 105-page Brief ("GB") correctly and fully cite any testimony in the 3,000 odd-page

transcript or any of its approximately 160 exhibits to evidence Anderson's alleged participation in a conspiracy to file a false report with the SEC.

In numerous instances the Government's Brief is on its face pure ipse dixit. Where record references do appear, in numerous instances they do not support the alleged essential facts upon which the Government relies. And in the remaining instances where record references do appear, they relate to matters which the Government argues are the most probative in its case, but which on their face are in no way referable to the conspiracy "to fool the SEC".

Specific crucial examples of the Government's misstatement of the case appear under the applicable point headings.

POINT I

A PRISON SENTENCE MAY NOT BE IMPOSED UNDER SECTION 32(a) OF THE 1934 ACT (15 U.S.C. §78ff(a)) FOR FILING A FALSE REPORT WITH THE SEC WHERE THE REPORT IS REQUIRED, NOT BY "THIS CHAPTER" OR "THIS TITLE" BUT ON THE CONTRARY, BY A "RULE OR REGULATION THEREUNDER".

The Government erroneously argues that §78ff(a)'s "no knowledge" proviso is inapplicable to a false filing where any report to the SEC "is required to be filed" (GB

43-4, 45, 47. Emphasis added.) Clearly, the Government misreads §78ff(a).*

The section deals with two broad classifications of reports: (1) those reports required to be filed expressly by the statute itself ("this chapter"); and (2) those reports required to be filed by "any rule or regulation thereunder". Where the report is expressly required by the statute itself -- Congressional enactment, as opposed to SEC fiat -- the

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*"§78ff. Penalties

"(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be . . . but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

"no knowledge" proviso is concededly inapplicable. However, where, as here, the report is required by a rule or regulation -- SEC fiat, as opposed to Congressional enactment -- the "no knowledge" proviso is applicable.

The legislative history of the 1934 Act contains clear and frequent references to Congress' intention that the "no knowledge" proviso of Section 32(a), 15 U.S.C. §78ff(a), was its way of ruling out imprisonment for a crime created by the SEC's administrative fiat, albeit under Congressional authority to promulgate "rules and regulations necessary and in the public interest for the protection of investors".

Accordingly, a prison sentence may be imposed for the violation of §78ff(a) arising from the false filing with the SEC of a report expressly required by "this chapter". Examples of reports expressly required by statute (as opposed to SEC rule or regulation), where only the <u>form</u> of the reports are left to the SEC, are: current and annual reports, required of certain publicly-held corporations by Section 13(a) of the 1934 Act (15 U.S.C. §78m(a)); and reports of transactions in the securities of certain publicly-held corporations by its "insiders", required by Section 16(a) of the 1934 Act (15

U.S.C. §78p(a)). See, e.g., United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972), which involved, inter alia, convictions for filing false current and annual reports.

On the other hand, where the conviction under 15 U.S.C. §78ff(a) arises from the filing with the SEC of a report nowhere referred to in the 1934 Act, but required only by a rule or regulation promulgated by the SEC pursuant to authority delegated by Congress, then the "no knowledge" proviso is applicable, and a prison sentence may not be imposed when the defendant had no knowledge of the applicable rule or regulation.

In Anderson's case the report (Form X-17A-5) is required only by Rule 17a-5, 17 C.F.R. §240.17a-5, and is nowhere mentioned in the statute. Indeed, in pertinent part the indictment charged a conspiracy to file a false report with the SEC, "in contravention of Rule 17a-5 (17 C.F.R. Section 240.17a-5)" (App. 25a). The Court found Anderson had no knowledge of the rule (App. 256a-257a). Accordingly, the prison sentence was illegal.

POINT II

THE GOVERNMENT'S CLEAR FAILURE OF PROOF -- THE 3,000 PAGES OF TESTIMONY AND 160 GOVERNMENT EXHIBITS DISCLOSE NO EVIDENCE OF ANDERSON'S PARTICIPATION IN THE CONSPIRACY ALLEGED.

The Government erroneously claims Anderson "helped to devise and carry out" a scheme to hide Orvis' financial condition (GB 3). This is legally insufficient and factually incorrect. First, it omits any mention of the essence of the conspiracy alleged -- to file a false financial report with the SEC. Second, Kilduff testified that Anderson was always informed of Kilduff's record-keeping after the fact and remained silent.

Only once, according to Kilduff, did Anderson say anything which the Government relies on to support its claim that Anderson participated in the conspiracy alleged. Misstating Kilduff's testimony, the Government says (without any record reference) that at the April 1969 meeting Kilduff reported a "violation of capital ratios established by the New York Stock Exchange . . . and Securities and Exchange Commission", whereupon Sloan and Anderson told him "to take all steps necessary to keep the firm in business" (GB 4). This is patently false.

Kilduff did not mention the SEC, but referred only to NYSE Rule 325 (149-51). And Anderson's sole comments were: "You have got to keep the place going . . . to make sure we keep the doors open because we could get additional capital" (207, 209).

Anderson was not "fully aware of Kilduff's and Eucker's activities" (GB 4). For example, the Government argued that Count 9 (hypothecation by Eucker) should go to the jury under Pinkerton (2309). Disagreeing, the Court dismissed Count 9 because it was "not within the contemplation . . . of the conspiracy. There is no evidence that he [Anderson] hypothecated" (2310-11, the very pages cited by GB 2's third footnote to support a contrary implication, namely, that Count 9 was dismissed to avoid "confus[ing] the jury").

There was no testimony that Anderson either hid or "continued to hide" the true financial condition of Orvis "from the SEC" (GB 5), or that Kilduff discussed his actions with Anderson "before" acting (GB 5), or that, even after acting, Kilduff "consulted and discussed his actions" with Anderson (GB 5).

Nor was Kilduff "corroborated in large part", or at all, by "two other key witnesses . . . Clinton . . . and

Netelkos" (GB 7). Netelkos claimed that by the Spring of 1970 Anderson had learned of the 1969 hypothecations and recommended that Netelkos not advise the Executive Committee about the problem (GB 54). This was nonsense. According to Kilduff and Mezzetta, as well as Anderson, Netelkos ran Orvis (430, 478, 481, 583-4, 1889). And, in March or April 1970 Netelkos told the general partners that Orvis' future was rosey (488). Kilduff never discussed hypothecation with Anderson or anyone else at Orvis (417).

Clinton's testimony was similar to Anderson's -- he did not recall anything at all said by Anderson (2192-3), and, with respect to the 80,000 share trade, "Sloan could have concluded . . . that a deal had been made" (2238). Anderson thought it was a deal. Kilduff too thought it a good trade until May 1970 (724-5).

GB 26 points to Ex. 108A and cites pages 1174 and 2198 to evidence its claim that Clinton Oil "wrote a letter to Haskins & Sells" denying the trade. This language is disingenuous. While the letter was written, it was never sent. Ex. 108A was an unsigned copy of the letter purportedly written by Rick Clinton. It was received over objection (1173-6). Although the Government represented he would testify to sending

it (1397), Clinton denied writing it and did not recall signing it (2198-9). Haskins & Sells never received it (1372-3, 1375).

Criticizing the Executive Committee minutes, the Government erroneously claims they were "kept, transcribed and received by Sloan or Anderson" (GB 8). They were kept by Villani, who was acquitted, and nothing was left out or changed (2769, 2774-7). The partner who placed no credence in them (GB 8, footnote) was Mezzetta who, the Court observed, remembered nothing (1876-8).

Citing pages 917-20, GB 9 says: "Kilduff instruct[ed] his employees to make certain 'adjustments' -- not all of them proper -- to bring the capital ratio down to acceptable limits." Pages 917-20 contain the testimony of Bascom, who was there talking only about the year 1968 (917). Bascom testified to only one instance of an adjustment in 1968 that he considered improper. A dividend receivable had been on the books for 32 or 33 days -- 2 or 3 days longer than the period a receivable could be pending in order to be considered good capital under NYSE Rule 325 [which, of course, the NYSE could waive]. There was a question of its collectibility, but it was taken as good capital (917-18). Cross-examination revealed that this one adjustment involved a dividend of IBM (948-9).

Citing page 241, GB 13 erroneously states that the decision not to deduct salesmen's commission's on the sale of the Clinton oil and gas units was known to Anderson. Pages 241-2 contain Kilduff's testimony that when he said, "One thing we can do is to not accrue the commission due the salesmen", "They [Anderson et al.] didn't say anything".

Lumping together two different incidents involving the receipt by Orvis of 4,344 shares and 5,000 shares of Clinton Oil, GB 13-14 garbles both transactions, to neither of which Anderson was a party. The 4,344 shares were not sent "with directions that it be sold to partners of Orvis". Pages 263-7, cited by GB 13, contain Kilduff's testimony, admitted over objection, that he understood "for the partners" to mean "for sale to the partners". Anderson said nothing and had nothing to do with how the shares were treated (267-70).

Contrary to GB 14's claim that "Orvis' capital position was not deflated by the cost of the 4,344 shares, the shares were "costed" in early August, prior to the Haskins & Sells' audit, when, for the first time, Clinton furnished the necessary information to Sloan who gave it to Kilduff (Ex. 44, Ex. Z, 294, 296-8, 712, 714, 718-19). GB 14's footnote that Clinton was upset over not having been paid by Orvis, is pure invention. Moreover, that same footnote, which is to GB 14's

claim at line 6 that the shares were "on the Orvis books without cost", cites page 296 to support its allegation that "Anderson knew of this also". On the contrary, pages 296-8 contain Kilduff's testimony about telling the Executive Committee, including Anderson that the cost had hurt capital by a comparable amount.

The 5,000 shares of Clinton Oil were received "for the partners" in May, when Anderson was away (286-8, 2426).

In discussing the general partnership meeting of August 20, 1969, GB 17's second footnote claims that it was Anderson who directed the public stenographer not to memorialize the debate about the Fund of Letters trade. However, Kilduff testified that it was not Anderson, but Sloan (349-50). Whoever it was, there was an open discussion on the subject of the open Fund of Letters debit before the entire general partnership -- certainly not a conspiratorial act.

At the August 20th meeting Sloan said Orvis needed $1,500,000 to survive. However, contrary to GB 18, page 343 does not show Anderson then knew the capital ratio exceeded 20:1.

At this meeting Sloan announced his receipt of $500,000 from Clinton. On August 26th the money was placed in the firm trading account (359), without Anderson's presence or participa-participation (354-60). Later, in early September, when Kilduff

mentioned it in the presence of those who had participated in the decision and execution, at which time Anderson was also present, Anderson said nothing, but was "just listening" (364).

In discussing the Goodbody report, GB 22 cites only page 1072 in saying Goodbody interviewed Anderson, seeking to tax Anderson with the Orvis failings disclosed therein. But Goodbody met Anderson only twice (1109).

On April 8th he and Duffy met Anderson by way of introduction. They discussed Anderson's responsibility for corporate finance. The only specific recalled by Goodbody was Anderson's request that he look into the accounting treatment for underwritings, because Anderson felt that possibly some Orvis expenses were not being passed on to the rest of the underwriting syndicate (1109-10).

Goodbody's second and last meeting with Anderson was when he and Eucker debated the accuracy of his and Duffy's report on August 11th before the Executive Committee (1109; see also 1078-9, 1105-6, 1111). Goodbody had no recollection of Anderson's comments (1110), and he had no recollection of what was discussed (1082-3).

GB 23's claim that the Goodbody report (Ex. 71) states that "Orvis' reports filed with the NYSE and the SEC were 'significantly incorrect'", is patently false. Only pages

23-4 and 31-3 are in evidence. There is no mention whatsoever of the SEC.

Citing page 2191, GB 24 misstates the record in discussing the August 22nd Memphis meeting of Sloan, Anderson and Doggerel with Clinton. While Clinton said he was "astonished by the attitude of the meeting", GB 24's addition to the quote of the words "of Sloan and Anderson" is unsupported by the record. It is a deliberate attempt to mislead the Court into believing Clinton expressed astonishment with Anderson's attitude, when in fact Clinton testified he could recall nothing said by Anderson, and that if Anderson said anything, it made no impression on him (2192-3).

Nor is GB 24 correct in alleging Clinton's impression that Orvis had just received six or seven million dollars' capital from his associates and himself. Page 2191 recites that Gamelson and Smith had said Orvis had capital in that amount.

Hoping by constant repetition to convince the Court of Anderson's participation in a conspiracy to fool the SEC, although there is no such evidence in the record, GB 25's footnote repeats the allegation, relying solely on ipse dixit.

This footnote and a similar footnote at GB 59 also incorrectly state that Sloan, Anderson and others advised

Mezzetta to invest $75,000 because "the fortunes of the firm were improving", citing pages 1751-5. Once again the record reference does not support the claim. It was Sloan who said this. No one else was present (1752-3). Mezzetta did not say he was asked to invest by Anderson (1754).

And GB 59's footnote disingenuously refers to Haggerty's partnership in August 1969 by coupling it with "assurances from Anderson". Haggerty was made a partner during Anderson's absence in May (Anderson Br. 6). He was brought in by Villani* and Sloan (1281-3). Anderson's "assurances" to

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*Straining to explain the acquittal of Villani and the conviction of Anderson where Kilduff's testimony as to both was almost identical, the Government ignores Villani's testimony that he correctly and fully kept the minutes Kilduff said were incorrect and incomplete, and that Kilduff's version of the mid-April meeting was false.

Its footnote at GB 51 ("Villani did not vocally authorize Kilduff to do anything") ignores Villani's statement, made in the context of "keeping the doors open", that Villani would get more capital (207).

Its footnote at GB 69 erroneously states that "Villani had said nothing at the April meeting, had not encouraged Haggerty . . . to invest capital". On the contrary, at the April meeting Villani said he too would get more capital (207), and it was he who (with Sloan) procured Haggerty's investment in Orvis (1281-3).

Haggerty was a much later accurate statement that new capital was coming in (1310).

Most unfair of all to Anderson is the allegation, rejected by the jury, that Anderson and Villani were among those representing Orvis at the review of Form X-17A-5 with Haskins & Sells (GB 28). Both Villani and Anderson denied being present. Villani was acquitted on both counts. Anderson was acquitted on Count 8, the substantive count that charged the filing of the Form X-17A-5. A verdict may be inconsistent, but it may not be irrational and against the preponderance of the testimony, including that of the Government's own witness.

The Haskins & Sells partner in charge of the audit was Sturgis (2338-9). He was present at the October review with Orvis and was the only one who kept a written record of those present. Both Sturgis' diary (Ex. BO) and the diary extracts prepared by the Government before the trial (Ex. 74-B) record the presence of Orvis by Sloan, Eucker and Kilduff. Neither Anderson nor Villani was present, according to Sturgis (2344-5, Ex. BO, Ex. 74-B).

The other two representatives of Haskins & Sells at the review were Taggart and Vayda. Both were called by

the Government. Taggart said Orvis was represented by Sloan, Eucker and Kilduff (1388-9). Vayda testified on direct that Sloan, Eucker and Kilduff appeared for Orvis, but that he was not sure of Anderson and Villani (1322)* because he could not recall the participants (1323). GB 28 cites these two pages, 1322-3, to support Anderson's and Villani's alleged presence.

Cross-examination of Vayda revealed that in prior NYSE testimony he had said that Sloan, Eucker and Kilduff were present and "perhaps someone else or perhaps two others, but I just can't, you know, recollect" (1358-60a). Vayda admitted he could not say Anderson or Villani was present -- only "it could possibly be that it could have been Mr. Villani or Mr. Anderson . . . Sir, I would not state categorically that they were there or the other way. I have been trying to point that out over the last hour" (1362-3). Nor could Vayda recall the specifics of the review (1375-8, 1380-1).

The Government's brief ignores this testimony. Its mention only of pages 1322-3 in Vayda's testimony tells us something more about the Government's selective record references.

Of all the witnesses, prosecution and defense, only Kilduff erroneously placed Anderson at the meeting (412). But

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*Anderson unsuccessfully objected to allowing the jury to speculate about this testimony (1322).

Kilduff was also confused about the Haskins & Sells team. He replaced Taggart with Petrillo (411), who had nothing to do with the 1969 audit (Ex. BN, 2339).

The foregoing is an analysis of its case as claimed by the Government. The Government has taken similar liberties with the record in purporting to recite the defendant's case. Limitations of time and space rule out further discussion, except for a response to the unworthy attack upon Peter Schmidt, Esq. (GB 41-2).

After Mr. Schmidt testified, he was recalled by the Court (without the knowledge of the defense) for further testimony out of the jury's presence. The Court wanted to determine whether his prior testimony really reduced itself to no more than the fact that Levine of the NYSE did not offer Kilduff a deal if he implicated others, but merely warned Kilduff against committing perjury. The record shows the Court's belief that it was the latter, is clearly erroneous (Anderson Br. 72-6).

Citing page 2724, GB 42 states that the Court "had serious questions as to the veracity of Schmidt". At page 2724 the Court incorrectly observed that Mr. Schmidt's testimony was "considerably watered down when he was recalled". On the

contrary, the record shows it was stronger (Anderson Br. 72-6). Continuing, the Court said (2724-5):

> "Mr. Schmidt's testimony unequivocally said -- whether it is correct or not is another question -- that Mr. Kilduff had been told he should tell the truth. That is all that Mr. Schmidt finally came down with.
>
> "Mr. Schmidt interpreted that as meaning that it would be easier with him if he testified than if he didn't. Mr. Schmidt in my recollection didn't remember those exact words being used and that was his impression of what was said to him."

Once again, the Court's recollection was contrary to the record (Anderson Br. 72-6).

Mr. Schmidt had made almost contemporaneous notes of the events about which he testified. During his direct testimony before the jury, he asked if he could refresh his recollection by looking at the notes, which he did in open court. At the Government's request the notes were marked Def. Ex. BT id (2455). Mr. Schmidt again used Ex. BT id. to refresh his recollection in open court during cross-examination by Villani's attorney (2462).

There is no mention of this in GB 41-2; nor of the fact that Mr. Schmidt had offered his notes to the Court at the conclusion of his testimony before the jury. Although GB 42 cites page 2611, it makes no mention of this colloquy

between Mr. Schmidt and the Court at page 2611:

> [Mr. Schmidt]: "When I left here yesterday, I offered them [the notes, Ex. BT id.] to the Court . . . I did offer them."
>
> [THE COURT]: "I understand."

In arguing the sufficiency of its case, GB 49 relies heavily ("especially damaging to the Anderson claim of 'silence'") on the August 20th(sic) Memphis meeting of Sloan, Anderson, Doggerel and Clinton, and upon the visit of Gamelson and Smith to New York a few days later. The Memphis meeting occurred after August 20th. It had nothing to do with any report to the SEC, but was largely concerned with Orvis' need for more capital. Clinton recalled nothing said by Anderson (2192-3). How does the Memphis meeting rebut the "Anderson claim of silence"?

Nor did the subsequent visit of Gamelson and Smith with Anderson involve the SEC. At that meeting Anderson assuaged their fear that Orvis was dumping Clinton Oil stock on the market and said that Orvis' financial condition was satisfactory. Anderson refused Gamelson's proffer of additional capital and returned his stock (1115, 1163-4, 1188, 1193, 1196, 1204-5, 1211, 1214-16, 1270-3).

Contrary to GB 51's footnote, Anderson's brief covers the alleged mid-April meeting in detail at pages 8-15. GB 52's

recital of Kilduff's falsifications is equally erroneous. 70% of the $797,000 Clinton Oil & Gas Units' commission was receivable in August, the cost of the 4,344 shares was posted, and Haskins & Sells, with full awareness of the longstanding open debit balances in the customers' cash accounts, approved Kilduff's accounting treatment (Anderson Br. 15-19, 27-8).

The record is barren of support for GB 54's allegations that Anderson "ratified" Kilduff's falsifications and "authorized" further ones, that Anderson "reviewed" Haskins & Sells' report with them, and that he knew it was going "to . . . the SEC".

Faced with a barren record, the Government argues that Anderson's failure to disclose Orvis' financial condition to others -- which it equates with a "cover-up" -- is probative of his participation in a conspiracy directed against the SEC. Its reliance on note 10 in United States v. Freeman, 498 F.2d 569, 575 (2d Cir. 1974), is misplaced. Note 10 states that "where the act of concealment is done in furtherance of the main criminal objectives of the conspiracy, the initial agreement can fairly be said to include the concealment phase".

In Anderson's case, there was no proof of Anderson's participation in a conspiratorial objective to fool the SEC,

let alone that his silence was designed to further that objective.

In United States v. Franzese, 392 F.2d 954, 964 (2d Cir. 1968), vacated, 394 U.S. 310 (1969), the evidence of concealment of the conspiracy to rob was admissible as evidence of the proven on-going conspiracy to rob. Here the Government erroneously relies on Anderson's silence, which was not referable to the SEC, to establish his wilful participation in a conspiracy to file a false report with the SEC.

The concealment in United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. den., 406 U.S. 917 (1972) consisted of false statements, false testimony, false affidavits, false documents, and false current and annual reports -- all given by the defendants to the SEC, in connection with sham transactions they falsely reported to the SEC. There the concealment was the conspiracy. Colasurdo does not support the Government's argument that Anderson's alleged concealment of Orvis' financial condition from his partners and Clinton Oil proves he was part of a conspiracy to fool the SEC.

Moreover, the discussion of whether Anderson's silent presence "at the scene of the crime" (GB 56) constitutes participation therein [cf. United States v. Terrell, 474 F.2d

872 (2d Cir. 1973) at p. 875; compare United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), cert. den., 390 U.S. 925 (1968)], should not obscure the fact that Anderson was never present "at the scene of the crime". He was allegedly present when Kilduff disclosed his prior false record-keeping, and he was present at various times when Orvis' financial condition was discussed. But he was never present at any time when there was any discussion about filing a false report with the SEC -- and the Government can point to no such testimony.

For this reason the Government is reduced to the erroneous argument (GB 56-7) that "Anderson's conduct in remaining silent . . . was evidence of his participation in the conspiracy", and that "Anderson's silence was no less than tacit approval [which] constituted ongoing acts in furtherance of the conspiracy". On the contrary, Anderson's silence was not enough to make him part of a conspiracy, and, more importantly, it is in no way referable to false filing with the SEC.

Realizing the bankruptcy of its case, the Government relies on "two specific examples of Anderson's affirmative action" (GB 57). (1) The alleged mid-April 1969 meeting, at which, according to Kilduff and contrary to GB 57, Anderson did not tell him "to do whatever had to be done to keep the firm

open", but rather "to make sure we keep the doors open because we could get additional capital" (207, 209). And very substantial additional capital was obtained.

(2) The previously discussed Memphis meeting with Clinton -- at which, according to Clinton, Anderson was silent. GB 58 mysteriously regards this as "clear, affirmative action in furtherance of the conspiracy", apparently because at this meeting Sloan tried to get additional capital from Clinton.

Yet, when shortly thereafter Anderson rejected additional capital from Gamelson and expressed his belief to Gamelson and Smith that Orvis was sound, this too, according to GB 58, "was an unambiguous affirmative act in furtherance of the conspiracy".

The reasoning of GB 58-9 is that, had Anderson not lied to Gamelson and Smith, and "if [they] then informed the NYSE or the SEC, Orvis would be closed down", and this proves a conspiracy to file a false report with the SEC! Of such stuff was the Government's case made.

There was no proof of affirmative conduct by Anderson referable to the conspiracy alleged. Indeed, there was no proof of silence by Anderson at any meeting referable to the conspiracy alleged. There was no proof that Anderson's silence was planned

with the other alleged conspirators, let alone that it was planned with reference to the conspiracy alleged. There was a total failure of proof.

POINT III

RECOGNIZING ITS FAILURE OF PROOF UNDER RULE 8c-1(a)(3) AS INCORPORATED IN THE CONSPIRACY COUNT, THE GOVERNMENT ON THIS APPEAL ARGUES FOR THE FIRST TIME THAT IT WAS RULE 8c-1(a)(1) THAT WAS INVOLVED, ALTHOUGH THE ISSUE OF COMMINGLING WAS NOT RAISED BY THE INDICTMENT OR ON THE TRIAL.

The indictment alleged a substantive violation of Rule 8c-1 (Count 9); a substantive violation of Rule 17a-5 by falsely reporting to the SEC that (inter alia) the erroneous hypothecation had been subsequently corrected (Count 8); and a conspiracy (inter alia) to violate Rule 8c-1 and Rule 17a-5 (Count 1).

Although the indictment did not state the subdivision of Rule 8c-1 involved, the indictment's language tracked most of the language of Rule 8c-1(a)(3). It tracked none of the language of Rule 8c-1(a)(1). One can only marvel at GB 92's claim that the Government never intended to proceed under Rule 8c-1(a)(3).

In attempting to allege a violation of Rule 8c-1(a)(3), the indictment erroneously omitted the crucial words, "for a

sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts". Pre-trial, trial and post-trial motions attacking the insufficiency of the indictment and evidence in this regard were uniformly denied.

Count 9 did not go to the jury. Contrary to GB 70's second footnote, this was not because the Court wanted to simplify the case even though it could be properly submitted. It was because the hypothecation was not within the contemplation of the conspiracy and there was no proof that Anderson was responsible (2310-11). Kilduff never discussed hypothecation with Anderson or anyone else at Orvis (417).

Counts 1 and 8 did go to the jury, which convicted on Count 1. It was permitted to convict, not under the commingling provisions of Rule 8c-1(a)(1), as to which there was no indictment, no proof and no jury instruction. Rather, it was permitted to convict solely on proof that the customers' free securities that had previously been hypothecated in error had not been later retrieved by the time Form X-17A-5 was filed.

That is how "since corrected" was construed -- namely, that all hypothecation of customers' free securities was illegal (2311), regardless of all customers' aggregate indebtedness; and that if any customers' free securities remained

as collateral for Orvis' bank loans, regardless of the sum of the aggregate indebtedness of all customers, then the amount of the erroneous pledge had not been corrected.

The Government was not required to meet its burden of proof by establishing that the amount of customers' securities pledged in error had not in fact been corrected when Form X-17A-5 was filed, because the amount still exceeded the aggregate indebtedness of all customers. And the defense was not permitted to show that the amount of customers' securities pledged in error had in fact been corrected when Form X-17A-5 was filed, because the amount remaining under pledge did not exceed the aggregate indebtedness of all customers.

Indeed, a Government witness testified that there was a rule of the SEC "not to pledge customers' securities with banks" (1934). There is of course no such rule. Yet no cross-examination about this matter was permitted (1937).

The defense asked, "In substance, what does that rule say?" The Government objected, saying, "It is a question of law." Whereupon the Court said, "He doesn't know." (1937).

The defense then asked: "Doesn't the rule say . . . that you cannot pledge customer securities which are free in an amount exceeding the aggregate indebtedness of all customers?"

Thereupon the Government again objected, saying, "That's a legal argument that we have had in this case" (1937-8), referring to the defense's unsuccessful pre-trial motion attacking the legal insufficiency of the indictment under Rule 8c-1(a)(3).

GB 71 argues that the Court was correct in requiring Anderson to choose between: (1) conceding the existence of a conspiracy and excluding evidence of illegal [post-1969 audit] hypothecation and (2) refusing to concede the conspiracy's existence and allowing such evidence. This is erroneous.

There was no conspiracy to hypothecate customers' free securities (417, 2310-11). Evidence of post-1969 audit hypothecation was not relevant with respect to the hypothecation figures in the 1969 audit. And, with respect to such post-audit hypothecation -- from late 1969 through the Spring of 1970 -- there was no proof of illegality under Rule 8c-1(a)(3) or any other provision. The Government treated all hypothecation as illegal and convicted Anderson by telling thejury that millions of dollars of customers' securities were pledged when he was the second in command of Orvis.

In a fancy display of confession and avoidance, the Government concedes its error (Footnote, GB 70) but invokes the commingling provision, Rule 8c-1(a)(1), although it was

not even charged in the indictment. The allegation of commingling does not appear in any form, nor by any fair construction can it be found within the terms of the indictment. The matter was never even raised at trial, and Anderson had no opportunity to defend against such charge. This violates Anderson's Fifth Amendment right to have the grand jury consider the indictment, Ex Parte Bain, 121 U.S. 1 (1887), and his Fifth Amendment right under the Due Process clause.

The verdict was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the specification under which Anderson was convicted, the conviction must be set aside if any of the specifications submitted to the jury was insufficient. Cramer v. United States, 325 U.S. 1, 36, n. 45 (1945). The hypothecation specification ("since corrected") being legally insufficient, the conviction must be reversed.

POINT IV

THE GOVERNMENT REPEATEDLY USED VESCO'S NAME IN THE FUND OF LETTERS TRADE AND ELSEWHERE TO CONVICT ANDERSON.

Contrary to GB 81-2, the Government did not restrict itself to a "few references to Vesco . . . only as required to

put relevant evidence before the jury". It began with the opening false allegation that Anderson "wore two hats" and by clear implication was serving ICC and Vesco. It continued throughout the trial and into Anderson's cross-examination over objection as to his having been asked to be an ICC director by Vesco. There were about 15 references to Vesco by name before the jury (Anderson Br. 63-66).

The Court's cautionary instructions could not cause the jury to forget or ignore what the prosecutor kept saying throughout the four-week trial. As to cautionary instructions, the courts properly have said that "[i]t must be remembered that after the saber thrust, the withdrawal of the saber still leaves the wound." United States v. Rudolph, 403 F.2d 805, 807 (6th Cir. 1968); United States v. Gray, 468 F.2d 257, 260 (3d Cir. 1972) (en banc). As Mr. Justice Jackson said, concurring in Krulewitch v. United States, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."

Here, the prosecutor's repetition of Vesco's name made cautionary instructions alone especially inadequate. See, e.g., United States v. Kilpatrick, 477 F.2d 357, 360-61 (6th Cir. 1973). Indeed, to hold that cautionary instructions for

repeated comments are alone sufficient would merely license improper comments: if a prosecutor knows that instructions will ultimately save his impropriety, then after the first adverse comment (and instruction) he can feel free to continue.

Finally, GB 81 misstates Anderson's requested instruction on the Fund of Letters transaction. Contrary to GB 81, the request did not seek an instruction that Anderson could be convicted only on that transaction. The request related only to a finding of guilt based on that transaction: "Two, you may not convict Mr. Anderson on the basis of the Fund of Letters transaction unless . . .". See the requested instruction quoted in full (Anderson Br. 61).

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